ANANDA v. FELIXIA VARNAKULASINGHE & ORS.

[F.C. (Gill C.J., Ong Hock Sim and Raja Azlan Shah F.JJ.) July 7, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 48 of 1976]

Practice and Procedure — Costs — Order for costs to be paid personally by attorney of administrator — Set aside.

This was an appeal from the order of the High Court under which the appellant, the attorney of the administrator was ordered to pay the costs personally in proceedings in which an order for the sale of land belonging to the estate was set aside. The appeal against the main order was allowed.

Held: (1) as the appeal against the main order has been allowed, the order for costs must be set aside and costs ordered to be paid by the respondents;

(2) in any event the order of costs personally against the appellant could not possibly stand.

FEDERAL COURT.

S.D.K. Peddie for the appellant.

C. Thambiah for 1st respondent.

Stanley Ponniah for 2nd respondent.

Sydney Augustine for 3rd and 4th respondents.

Gill C.J. (Malaya): This appeal is connected with Civil Appeal No. 19 of 1976* to this court. That was an appeal from an order of Ajaib Singh J. dated January 18, 1976 setting aside his earlier order of November 25, 1974 whereby leave was granted for the sale to the second respondent to this appeal of land belonging to the estate of John David deceased. The application for sale was made by the appellant as the attorney of the administrator of the estate of Joseph Jacob David @ Jacob Joseph. The order to set aside the sale was made on the application of the first respondent to this appeal as the grand-daughter of Elizabeth Muttama who was entitled to 1/16th share under the deceased's will. The third and fourth respondents to this appeal had intervened in the proceedings to support the application of the first respondent.

This appeal is confined to the order which the learned judge made as regards the costs of and incidental to the application made by the first respondent for the setting aside of the order of sale. The order appealed from is that the costs be taxed and paid personally by E.P.E. Ananda, the attorney of Joseph Jacob David to Felixia daughter of Varnakulasinghe, Gan Khay Beng and Bee Chuan Rubber Factory Sendirian Berhad, and that Ng Lit Cheng @ Mg Yam Chee do pay costs of the proceedings from the date of his having been made a party to the proceedings to Felixia d/o Varnakulasinghe.

The appeal is made on numerous grounds, the main ground being that the learned judge was wrong in law in ordering the appellant personally to pay the costs as he was the attorney and consequently the agent of a disclosed principal and was not even the administrator of the estate of the deceased.

As we have allowed appeal No. 19 of 1976 with costs I do not think it is necessary for me to consider any of the grounds in support of this appeal. Even if the other appeal was dismissed the order of costs personally against the present appellant could not possibly stand on the one ground of appeal which I have referred to in the last paragraph. As it is, the other appeal having been allowed, I can see no alternative but that this appeal should also be allowed.

I would therefore set aside the order appealed from and substitute in its place an order that the first respondent, who was the applicant in the court below, and the third and fourth respondents, who had intervened to support the first respondent's application, do pay the costs of the appellant and of the second respondent who certainly had a better right to intervene in the proceedings than the third and fourth respondents. The first, third and fourth respondents must also pay the costs of the appellant and the second respondent in so far as this appeal is concerned.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Order accordingly.

Solicitors: *Skrine & Co.; Chellappah Thambiah; Stanley Ponniah, Ng & Soo; Augustine-Negrin & Co.*

* *Supra* p. 249.

GOVERNMENT OF MALAYSIA v. ZAINAL BIN HASHIM

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) June 27 and July 21, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 49 of 1975]

Administrative Law — Delegation of powers of Police Force Commission — Power of dismissal of constable delegated to Chief Police Officer — Power of appointment not delegated — Amendment to Federal Constitution with retrospective effect — Federal Constitution, Article 135(1).

Constitutional Law — Amendment of Constitution with retrospective effect — Police Force Commission — Power of dismissal delegated to Chief Police Officer — Federal Constitution, Article 135(1).

Practice and Procedure — Appeal — Appeal by way of rehearing — Court can make order on appeal according to law at time of appeal — Courts of Judicature Act, 1964, s. 69(1) and (4).

Practice and Procedure — Costs — Fair.

This was an appeal from the decision of Abdul Hamid J. ([1975] 2 M.L.J. 262) in which it was decided that as the Chief Police Officer had not been delegated with power to appoint but merely with the power to dismiss, the purported dismissal of the respondent by the Chief Police Officer was in violation of Article 135(1) of the Federal Constitution and therefore void. The Government of Malaysia appealed. Before the hearing of the appeal Article 135(1) of the Federal Constitution had been amended to provide that it shall not apply where power to dismiss had been delegated to an authority and the amendment was given retrospective effect from August 31, 1957. Notice that the appellant would rely on the amendment had been given to the respondent's counsel. It was argued for the respondent that the amendment could not be applied to this case.

Held: (1) the amendment to Article 135(1) can be made with retrospective effect and therefore the Chief Police Officer must be deemed to have power to dismiss the respondent;

(2) appeals to the Federal Court are by way of rehearing and the Federal Court is authorised to make such order on appeal as ought to be made according to the law at the date of the appeal.